IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CELLCO PARTNERSHIP, d/b/a BELL ATLANTIC MOBILE	:	CIVIL ACTION
v.	:	
MICHAEL HESS, HARRY L. SETH, MATTHEW J. KIKUT, JOHN J. WILWERT, JR., JOAN ARNOLD and JANICE SAWICKI, as Members of the Brookhaven Borough Council and THE BOROUGH OF BROOKHAVEN	:	NO. 98-3985

MEMORANDUM AND ORDER

BECHTLE, J. MARCH , 1999

Presently before the court are defendants Michael Hess's, Harry L. Seth's, Matthew J. Kikut's, John J. Wilwert, Jr.'s, Joan Arnold's and Janice Sawicki's, as Members of the Brookhaven Borough Council (collectively “Council Members”) and the Borough of Brookhaven's (“Brookhaven”) motion to dismiss and plaintiff Cellco Partnership, d/b/a Bell Atlantic Mobile's (“BAM”) response thereto. For the reasons set forth below, the court will grant the motion in part and deny the motion in part.

I. BACKGROUND

BAM is a Delaware General Partnership with its principal place of business in New Jersey. BAM is licensed by the Federal Communications Commission (“FCC”) to provide cellular telephone services to Delaware County, Pennsylvania and the areas surrounding Brookhaven. Under FCC licenses, BAM's cellular

telephone service system is part of a wireless telecommunications network running from Maine to Georgia operated in conjunction with BAM's affiliates in other regions.

Cellular telephone service operates by transmitting a low power radio signal between a wireless telephone and an antenna, which may be mounted on a tower, pole, building or other tall structure. The antenna feeds the signal to another telecommunications link and routes the signal to its ultimate destination. Because of the low power of the antenna, the signal distance in any direction to a wireless telephone is limited to a small area, known as a cell. To provide adequate and continuous cellular service, there must be a continuous interconnected series of cells. As a caller moves out of the coverage range of one cell, the signal is "handed off" from the first cell to the adjacent cell. Where there is a gap in coverage, the call is "dropped".

In order to facilitate the development of advanced telecommunications, Congress enacted the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 154, et seq. The TCA imposes certain restraints on actions by state and local governments which might limit the provision of wireless services, including cellular service, while preserving state and local government authority over decisions regarding the "placement, construction, and modification of wireless facilities." 47 U.S.C. § 332(c)(7).

In early 1996, BAM identified a need for a communications site in Brookhaven. In late August of 1996, BAM met with

representatives of Brookhaven to negotiate for a communications site on property owned by Brookhaven. In September of 1996, Brookhaven held a public meeting at which strong opposition was voiced concerning the installation of a communications site.

After the September of 1996 public meeting, BAM met with a potential lessor, First Republic Corporation of America ("First Republic"). During these lease negotiations, BAM met again with a Brookhaven representative to get its cooperation in selecting a proper location for their communications site on First Republic's property. A location was selected, but the Brookhaven representative stated that Brookhaven was "opposed to the construction of the installation of a communications tower anywhere within Brookhaven Borough and told the representatives of BAM to take their tower to some other community." (Compl. ¶ 30.) Lease negotiations continued with First Republic, but after BAM's meeting with the Brookhaven representative, residents of Brookhaven, "believed to be acting in concert with one or more" of Brookhaven's Council Members, threatened to boycott the merchants on First Republic's property if it entered into a lease agreement with BAM. Consequently, First Republic withdrew from its negotiations with BAM.

On October 24, 1997, BAM entered into a lease agreement with Ohev Shalom Synagogue to install a communications tower on a 10.5 acre tract of property used as a cemetery. The lease was conditioned on Brookhaven's approval of the site. On November

12, 1997, pursuant to Brookhaven's Ordinance No. 617,[1] BAM filed its first Application for Conditional Use Approval (the "first application"). Public hearings regarding the first application were held on January 8 and February 12, 1998. On February 19, 1998, the Brookhaven Council denied BAM's first application. The Council's decision cited deficiencies in BAM's first application under Ordinance No. 617. On February 26, 1998, BAM filed a Second and Amended Request for Conditional Use Approval (the "second application"). Public hearings on the second application were held on April 21 and May 20, 1998. At the hearings, BAM presented additional testimony with the intention of fulfilling the criteria for conditional use approval under Ordinance No. 617. On July 1, 1998, the Brookhaven Council denied BAM's second application. That decision also cites non-compliance with Ordinance No. 617.

On July 30, 1998, BAM filed its Complaint against Brookhaven and its Council Members. The Complaint alleges claims under the TCA ("Count I"), the Pennsylvania Municipalities Planning Code ("Count II") and 42 U.S.C. §§ 1983 and 1988 ("Count III").[2] On September 11, 1998, Brookhaven and its Council Members filed the instant motion to dismiss BAM's Complaint.

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[1] Ordinance No. 617 states criteria for the approval of an Application for Conditional Use and requires a communications facility to file such an application.

[2] The court has jurisdiction over Counts I and III pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over Count II pursuant to 28 U.S.C. § 1367(a).

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988). The court may also consider "matters of public record, orders, exhibits attached to the Complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Brookhaven's and its Council Members' motion to dismiss challenges BAM's claims under the TCA and 42 U.S.C. §§ 1983 and 1988, and requests that BAM's claims under the Pennsylvania Municipalities Planning Code be dismissed for lack of jurisdiction. The court will grant the motion in part and deny the motion in part. First, the court will address BAM's claims

under the TCA. Second, the court will address BAM's claims under section 1983. Last, the court will address why it will retain jurisdiction over BAM's state law claims under the Pennsylvania Municipalities Planning Code.

A. BAM's TCA Claims

BAM's Complaint alleges three specific violations under the TCA. First, BAM alleges that Brookhaven and its Council Members unreasonably discriminated against BAM by declining to allow them to compete with other wireless communication service providers in Brookhaven. See 47 U.S.C. § 332(c)(7)(B)(i)(I) (forbidding state or local governments from unreasonably discriminating among providers of functionally equivalent wireless services). Second, BAM alleges that the denial of its applications for conditional use have the effect of prohibiting the provision of communication services in Brookhaven. See 47 U.S.C. § 332(c)(7)(B)(i)(II) (forbidding state and local governments from prohibiting provision of personal wireless services). Third, BAM alleges that the Brookhaven Council's denials of its applications are not supported by substantial evidence in the written record. See 47 U.S.C. § 332(C)(7)(B)(iii) (requiring state or local government decision to deny request to construct personal wireless service facility to be supported by substantial evidence in written record). The court will address the sufficiency of each allegation separately.

1. Unreasonable Discrimination

Brookhaven and its Council Members argue that BAM's allegations of unreasonable discrimination must fail because the Complaint does not indicate that any functionally equivalent service was treated differently from BAM. The TCA provides that in regulating the placement of personal wireless service facilities, a state or local government "shall not unreasonably discriminate among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). In order to establish that Brookhaven unreasonably discriminated against it, BAM must show both that it was subject to unequal treatment and that Brookhaven's decisions to deny its applications were unreasonable. AT & T Wireless PCS v. City Council of Virginia Beach, 155 F.3d 423, 427-28 (4th Cir. 1998) (finding no evidence of intent to favor one service provider over another); National Telecommunication Advisors, L.L.C. v. Board of Selectmen of the Town of West Stockbridge, 27 F. Supp. 2d 284, 287 (D. Mass. 1998) (same); Cellular Telephone Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 24 F. Supp. 2d 359, 374 (D.N.J. 1998) (same); Gearon & Co., Inc. v. Fulton County, 5 F. Supp. 2d 1351, 1355 (N.D. Ga. 1998) (finding no discrimination where denial of application appeared to affect all providers equally); Cellco Partnership v. Town Plan and Zoning Comm'n of the Town of Farmington, 3 F. Supp. 2d 178, 185 (D. Conn. 1998) (stating that "in order for a zoning commission to have unreasonably discriminated among providers of functionally equivalent

services, there must be evidence that the commission treated the providers differently").

BAM's Complaint alleges that the Brookhaven Council's denial of its applications unreasonably discriminated among providers of communication services "by declining to allow BAM to locate in . . . Brookhaven, and provide communication services in competition with other wireless communication service providers." (Compl. ¶ 60.) The Complaint also alleges that the Brookhaven Council's denial "prohibits BAM from competing with other communications carriers who have, through other communications facilities, access to the communications market in . . . Brookhaven." (Compl. ¶ 72.) The court finds that these allegations are insufficient to withstand a motion to dismiss because they fail to set forth how Brookhaven or its Council Members treated BAM differently than any other communications provider. Thus, Brookhaven's and its Council Members' motion will be granted with respect to BAM's allegations that Brookhaven and its Council Members unreasonably discriminated among providers of functionally equivalent services.

2. Prohibiting the Provision of Personal Wireless Services

Brookhaven and its Council Members argue that BAM's allegations that they prohibited the provision of personal wireless services must fail because the denial of an application for conditional use at a single site does not have the effect of excluding personal wireless services in Brookhaven. The TCA

provides that in regulating the placement of personal wireless service facilities, a state or local government "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). In order to establish that Brookhaven prohibited or effectually prohibited the provision of wireless services, BAM must show that Brookhaven, by regulation or policy, set up a blanket prohibition or general ban on personal wireless services. AT & T Wireless, 155 F.3d at 428-29; Flynn v. Burman, 30 F. Supp. 2d 68, 75 (D. Mass. 1998).

BAM's Complaint alleges that Brookhaven and its Council Members engaged in a pattern of activity designed to ban the provision of personal wireless services from Brookhaven. (Compl. ¶¶ 30-32, 34, 50, 52, 53, 59 & 71.) Specifically, BAM has alleged that a Brookhaven representative stated opposition to the installation of a communications tower anywhere in Brookhaven and that BAM should "take their tower to some other community." (Compl. ¶ 30.) BAM also alleges that one or more of the Council Members acted in concert with residents of Brookhaven in order to prevent BAM from constructing a communications tower in Brookhaven. (Compl. ¶¶ 34 & 52.) The court finds that these allegations are sufficient to withstand a motion to dismiss. Thus, Brookhaven's and its Council Members' motion will be denied with respect BAM's allegations that Brookhaven and its Council Members prohibited the provision of personal wireless services.

3. Substantial Evidence in the Written Record

Brookhaven and its Council Members argue that BAM's allegations regarding the basis of their written decision denying the applications must fail because the decisions outline reasons why BAM's applications were denied and are based on substantial evidence. The TCA provides that "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place . . . personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Congress intended that the substantial evidence requirement of the TCA be equivalent to "'the traditional standard used for judicial review of agency actions.'" Bellsouth Mobility Inc. v. Gwinnett County, 944 F. Supp. 923, 928 (N.D. Ga. 1996) (citation omitted). Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1952).

BAM's Complaint alleges that the Brookhaven Council's decisions to deny its applications were not based on substantial evidence. (Compl. ¶¶ 45-62 & 73.) Specifically, BAM alleges that it demonstrated a need for personal wireless services in Brookhaven and that it presented evidence in compliance with Brookhaven's Ordinance No. 617. BAM further alleges that neither Brookhaven nor any member of the public introduced expert evidence in opposition to the evidence presented by BAM.

Moreover, BAM alleges that the Brookhaven decisions denying BAM's applications are against the clear and uncontroverted evidence in the written record. BAM alleges that Brookhaven's four reasons for denying its second application were unfounded and against the evidence of record. (Compl. ¶ 73.)

Brookhaven and its Council Members argue, without elaboration, that their written decision denying BAM's second application is "based on the substantial evidence of record." (Def.'s Mem. at 15.) However, Brookhaven and its Council Members do not point to any specific evidence in the record to support their conclusion. The court will not dismiss BAM's claims based on such an unsupported conclusion. Thus, Brookhaven's and its Council Members' motion will be denied with respect to BAM's allegations that the written decision denying its applications were not supported by substantial evidence.

B. BAM's Sections 1983 and 1988 Claims

BAM's section 1983 claims are based on its assertion that a violation of the TCA is a violation of section 1983. Brookhaven and its Council Members argue that the TCA does not give rise to a federal right, and thus, a violation of the TCA cannot be the basis of a section 1983 action. Alternatively, the Council Members argue that they are entitled to absolute and qualified immunity from suit and that the TCA does not provide a mechanism for BAM to bring suit against the individual Council Members. The court will first address why a violation of the TCA can form the basis of section 1983 claim. Second, the court will address

why the Council Members are not entitled to absolute immunity from suit. Third, the court will address why the Council Members are not subject to liability in their individual capacities. Last, the court will address why BAM's claims for attorney's fees under 42 U.S.C. § 1988 survive the motion to dismiss.

1. The TCA and Section 1983

To determine whether a section 1983 remedy is available for the violation of a federal statute, the court must engage in a two part inquiry. First, a plaintiff must assert a "violation of a federal right, not merely a violation of federal law." Blessing v. Freestone, 520 U.S. 329, 340 (1997). Second, if a federal right is established, the court must determine whether Congress intended to foreclose private enforcement through section 1983. Id. at 341. Initially, the court notes that several other district courts have concluded that a violation of the TCA can form the basis of a section 1983 claim. See Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Chadds Ford Township, No. 98-3299, 1998 WL 764762, at *4-10 (E.D. Pa. Oct. 28, 1998); APT Minneapolis, Inc. v. City of Maplewood, No. 97-2082, 1998 WL 634224, at *6-7 (D. Minn. Aug. 12, 1998); Cellco Partnership, 3 F. Supp. 2d at 186; Sprint Spectrum, L.P. v. Town of Easton, 982 F. Supp. 47, 53 (D. Mass. 1997); but see National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F. Supp. 2d 117, 119-22 (D. Mass. 1998) (holding section 1983 not available for violation of TCA because of its comprehensive remedial scheme).

a. Federal Right

In determining whether the TCA gives rise to a federal right, the court must look to three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing, 520 U.S. at 340-41 (citations omitted).

With regard to the first factor, the court finds that the TCA was intended to benefit BAM. The TCA--enacted to facilitate the development of advanced telecommunications services across the country--imposes restraints on state and local governments that might limit such development by wireless service providers. See 47 U.S.C. § 332(c)(7)(B) (placing limits on state and local governments' ability to deny requests to construct wireless service facilities). These restraints were designed by Congress to benefit both "consumers and businesses alike." Sprint Spectrum, 982 F. Supp. at 50. Thus, the court finds that BAM is an intended beneficiary of the TCA. With regard to the second factor, the court finds that BAM's interests protected by the TCA are not so amorphous that their enforcement would strain judicial competence. In fact, the TCA expressly gives the courts authority to review the decisions of local zoning authorities on an expedited basis. 47 U.S.C. § 332(c)(7)(B)(v). With regard to the third factor, the court finds that the TCA unambiguously

imposes a binding obligation on the states. As discussed, the TCA expressly forbids a state or local government from prohibiting the provision of wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). Thus, the court finds that the TCA creates a federal right in favor of BAM.

b. Did Congress Foreclose a Remedy under Section 1983?

Congress may specifically foreclose a remedy under section 1983 "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." Blessing, 520 U.S. at 341. The TCA does not expressly forbid enforcement under section 1983, so the court will move directly to a consideration of the TCA's enforcement scheme.

The court finds that the TCA's remedial scheme is not so comprehensive as to imply that Congress intended to foreclose section 1983 as an available remedy.[3] The TCA provides that:

> Any person adversely affected by any final action or failure to act by a state or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and

[3] The court notes its agreement with Judge Padova's opinion in Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Chadds Ford Township, No. 98-3299, 1998 WL 764762, at *4-10 (E.D. Pa. Oct. 28, 1998) (holding that TCA's remedial scheme was not so comprehensive as to foreclose section 1983 remedy), which disagreed with the district court opinion in National Telecommunication Advisors, Inc. v. City of Chicopee, 16 F. Supp. 2d 117, 119-22 (D. Mass. 1998) (holding section 1983 not available for violation of TCA because of its comprehensive remedial scheme).

decide such action on an expedited basis.

47 U.S.C. § 332(c)(7)(B)(v). While the TCA's provision allowing expedited judicial review of local zoning authority decisions does provide a private remedy, it does not erect as intricate a remedial scheme as other statutes which have been held to supplant section 1983 in other cases. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13-15 (1981) (describing "unusually elaborate enforcement procedures" under Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act); Smith v. Robinson, 468 U.S. 992, 1010 (1984) (stating that Education of the Handicapped Act "establishes an elaborate procedural mechanism"); see also Omnipoint, 1998 WL 764762, at *7-8 (comparing TCA enforcement provisions to statutes in Sea Clammers and Robinson). Furthermore, the Third Circuit adheres to a policy of judicial deference, "ruling out certain remedies only when it can be clearly inferred that Congress intended their preemption." Johnson v. Orr, 780 F.2d 386, 395 (3d Cir. 1986). Such intent is not clearly expressed by the TCA's provision allowing for judicial review of local zoning decisions. Moreover, allowing a section 1983 remedy in addition to the judicial review contemplated by the TCA would not be incompatible with the remedial scheme under the TCA. In fact, nothing in the TCA or its legislative history indicates Congressional intent to foreclose a section 1983 remedy. Thus, the court finds that a TCA violation can form the basis of a section 1983 claim.

2. Absolute Immunity

The Council Members cite Bogan v. Scott-Harris, 118 S. Ct. 966 (1998), for the proposition that local legislators are entitled to absolute immunity from civil liability for their legislative activities. However, Bogan is inapplicable to the Council Members here. "Whether an act is legislative turns on the nature of the act." Id. at 973. BAM's Complaint against the Brookhaven Council challenges its denials of BAM's applications, which were based on Ordinance No. 617. In such a situation, the Brookhaven Council engaged in an administrative rather than a legislative act. See Northpoint Breeze Coalition v. City of Pittsburgh, 431 A.2d 398 (Pa. Commw. 1981) (holding that granting conditional use application was not legislative act); see also Epstein v. Township of Whitehall, 693 F. Supp. 309, 315 (E.D. Pa. 1988) (holding that local legislators acting as zoning board members were acting in administrative capacity by applying already enacted ordinance to single plan for development). Thus, the Council Members are not entitled to absolute immunity under Bogan because they were not engaging in a legislative activity when they denied BAM's applications for Conditional Use.

3. Individual Capacity Liability

The Council Members make several arguments in which they assert that they are not subject to individual liability, including that they are entitled to qualified immunity and that the TCA does not provide a mechanism for BAM to sue them individually. BAM's Complaint names the Council Members "as

Members of the Brookhaven Borough Council." (Compl.) Because the Council Members are being sued in their official capacities they are not subject to individual liability. "[O]fficial capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. Department of Soc. Servs., 436 U.S. 658, 690 n.55 (1978).[4]

4. BAM's Section 1988 Claim

Because the court will deny Brookhaven's motion to dismiss BAM's section 1983 claims, it will also deny Brookhaven's motion to dismiss BAM's claim for attorney's fees pursuant to 42 U.S.C. § 1988.

C. BAM's Claims under the Pennsylvania Municipalities Planning Code

BAM also alleges state law claims under the Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. §§10101-1107. Brookhaven has not challenged the sufficiency of these claims in its motion to dismiss. However, it moved to dismiss these state law claims for lack of jurisdiction if the court dismissed BAM's federal claims. Because the court will deny Brookhaven's motion to dismiss with respect to two of BAM's TCA claims and its claims under section 1983, BAM's state law claims are subject to the

[4] Because this is not an individual capacity suit, qualified immunity is not available as a defense for Brookhaven. W.B. v. Matula, 67 F.3d 484, 499 (3d Cir. 1995) (stating that "qualified immunity shields officials acting only in their individual capacities") (citing Brandon v. Holt, 469 U.S. 464, 472-73 (1985)).

court's supplemental jurisdiction under 28 U.S.C. § 1367(a).

IV. CONCLUSION

For the foregoing reasons, the court will grant the motion to dismiss in part and deny the motion to dismiss in part.

An appropriate Order follows.

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MICHAEL HESS, HARRY L. SETH, MATTHEW J. KIKUT, JOHN J. WILWERT, JR., JOAN ARNOLD and JANICE SAWICKI, as Members of the Brookhaven Borough Council and THE BOROUGH OF BROOKHAVEN	:	NO. 98-3985

ORDER

AND NOW, TO WIT, this day of March, 1999, upon consideration of defendants Michael Hess's, Harry L. Seth's, Matthew J. Kikut's, John J. Wilwert, Jr.'s, Joan Arnold's and Janice Sawicki's, as Members of the Brookhaven Borough Council, and the Borough of Brookhaven's motion to dismiss and plaintiff Cellco Partnership, d/b/a Bell Atlantic Mobile's response thereto, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART as follows:

1. to the extent that the Complaint alleges claims against defendants Michael Hess, Harry L. Seth, Matthew J. Kikut, John J. Wilwert, Jr., Joan Arnold and Janice Sawicki in their individual capacities, the motion is GRANTED and the Complaint is DISMISSED as to those defendants;
2. with respect to Bell Atlantic Mobile's allegations in Count I of the Complaint that defendant the Borough of Brookhaven unreasonably discriminated among providers

of functionally equivalent services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(I), the motion is GRANTED and that claim is DISMISSED;

3. with respect to the remainder of Count I of the Complaint, the motion is DENIED; and

4. in all other respects, the motion is DENIED.

LOUIS C. BECHTLE, J.